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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 312.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

HENRY H. STAFFORD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED DECEMBER 19, 1889.

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a United States, eastern district of Pennsylvania, Sct.

The President of the United States, to the judges of the circuit court of the United States, in and for the eastern district of Pennsylvania, greeting:

Because that in the record and process and also in the rendering of judgment in a suit before you, between the United States of America, plaintiff in error, and Henry H. Stafford defendant in error, defendant in error in a plea of debt, a manifest error has intervened to the great damage of the said The United States of America, as in their complaint has been stated—and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf. You are hereby commanded that if judgment thereof be given, then under your seal, you do distinctly and openly send the record and process in the suit aforesaid with all things concerning them and this writ; so that you have the same before the honorable the justices of the Supreme Court of the United States, sitting at Washington, D. C., on the second Monday of October next, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, at Philadelphia, this third day of November, A. D. one thousand eight hundred and eighty-seven, and in the one hundred and twelfth year of the Independence of the said United States.

[SEAL.] SAMUEL BELL,
Clerk of Circuit Court, U. S.

b THE UNITED STATES OF AMERICA, *ss.*

To Henry H. Stafford, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of errror filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania in the third circuit wherein the United States of America is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, shall not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 29th day of November, in the year of our Lord one thousand eight hundred and eighty-seven.

WM. BUTLER,
Judge.

c PHILADELPHIA, *Dec.* 1, '81.

I hereby accept service of the within writ for Henry Stafford, defendant in error, and request the clerk to enter my appearance for him.

C. E. MORGAN, Jr.

1 In the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit:

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
HENRY H. STAFFORD, DEFENDANT IN ERROR. } October sess., 1887. No. 1.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of October sessions, 1887, No. 1.

It is thus contained:

1¼ Be it remembered, that on the 9th day of August, A. D. 1887, plaintiff, by its attorney, John K. Valentine, esquire, come into court here and sues forth therefrom a writ of error to the district court of the United States for the eastern district of Pennsylvania, which, with the endorsement and return thereto, is in the words and figures following, to wit:

1½ In the district court of the United States for the eastern district of Pennsylvania. Of May sessions, 1886, No. 8.

Pleas before the honorable the judges of said court.

It is thus contained:

THE UNITED STATES OF AMERICA
vs.
HENRY H. STAFFORD. } Summons. Debt.

Be it remembered, that on the sixth day of July, A. D. 1886, upon præcipe filed by John K. Valentine, esq., attorney of the United States for the eastern district of Pennsylvania, a writ of summons, debt, issued, which, with the return of the marshal thereto, is in the words and figures following, to wit:

2 United States, eastern district of Pennsylvania, set.

The President of the United States, to the marshal of the eastern district of Pennsylvania, greeting:

We command you, that you summon Henry H. Stafford, late of your district, if he may be found therein, so that he be and appear before the judge of the district court of the United States for the eastern district of Pennsylvania, at a session of the same court, to be holden at Philadelphia on the first Monday of August next, to answer to the United States of America of a plea that he render unto them the sum of five thousand dollars, which to them he owes, and from them unjustly detains, as it is said, &c., and have you then there this writ.

Witness the honorable William Butler, judge of said court, at Philadelphia, this sixth day of July, A. D. 1886, and in the one hundred and 11th year of the Independence of the said United States.

[SEAL.] W. W. CRAIG,
Clerk District Court.

2½ Marshal's return (endorsed :) July 6, 1886. Served the within writ on Henry H. Stafford by giving him a true and attested copy thereof, and making known the contents of the same to him. So answers. James N. Kerns, U. S. marshal, per Thos. Marple, deputy.

3 And afterwards, to wit, on the 24th day of August, A. D. 1886, comes John K. Valentine, esq., attorney as aforesaid, and declares against the said Henry H. Stafford in the plea aforesaid, in the words and figures following, to wit:

In the district court of the United States for the eastern district of Pennsylvania, of May sessions, 1886, No. 8.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

Henry H. Stafford, defendant, was summoned to answer the United States of America, plaintiffs, of a plea that he render unto the said plaintiffs the sum of five thousand dollars, lawful money of the United States, which he owes to and unjustly detains from the said plaintiffs.

4 And thereupon the said plaintiffs, by John K. Valentine, esquire, their attorney, complain and say, for that whereas heretofore, to wit, on the thirteenth day of March, 1865, the said Henry H. Stafford together with Henry Lewis and Joseph W. Lewis, by their certain writing obligatory, sealed with their seals, and now shown to the court here, the date whereof is the day and year aforesaid, acknowledged themselves, jointly and severally their joint and several heirs, executors, and administrators, to be held and firmly bound unto the said United States of America, in the full and just sum of five thousand dollars, money of the United States above, demanded to be paid to the said United States, which said bond or writing obligatory was and is subject to a certain condition thereunder written as follows, to wit:

That whereas the President of the United States had pursuant to law appointed the said Henry H. Stafford receiver of public moneys for the district of lands subject to sale at Marquette in the State of Michigan, by commission dated the ninth day of March, 1865; and whereas the

5 said Henry H. Stafford had also been appointed a "disbursing agent" of the Government under the provisions of the act entitled "An act requiring all moneys receivable from customs and from all other sources to be paid immediately into the Treasury without abatement or reduction," &c., approved March 3, 1849. Then, therefore, if the said Henry H. Stafford should faithfully execute and discharge the duties of his office as "disbursing agent," as aforesaid, and should promptly and faithfully account for all moneys that might legally come into his hands for disbursement, then the above obligation to be void and of no effect, otherwise it should abide and remain in full force and virtue.

Nevertheless, the said plaintiffs say, that after the making of the said

writing, obligatory, to wit, on the twelfth day of May, 1869, the said Henry H. Stafford did not faithfully execute and discharge the duties of his office as "disbursing agent," as aforesaid, and did not promptly and faithfully account for all moneys that legally came into his hands
6 for disbursement, in that he did not then and there pay over to the said plaintiffs a large sum of money, to wit, the sum of one thousand two hundred and two dollars and sixty-six cents, as required by the provisions of the act of Congress in such case made and provided, which said sum of money was then and there due the said plaintiffs by the said Henry H. Stafford in his said capacity of "disbursing agent," as aforesaid, on account of moneys theretofore received by him, the said Henry H. Stafford, in his said official capacity as "disbursing agent," and not paid over to the said United States.

Nor has the said Henry H. Stafford at any time since paid or caused to be paid to the said United States the said sum of one thousand two hundred and two dollars and sixty-six cents, on any part thereof, although often requested so to do, but the same to pay, or any part thereof, hath hitherto wholly neglected and refused and still doth neglect and refuse.

By reason of which said breaches the said writing obligatory became forfeited, and an action hath accrued to the said plaintiffs to demand and have of and from the said defendant the said sum of five thousand dollars above demanded.

7 Yet the said defendant, although often requested so to do, hath not as yet paid the said sum of money, or any part thereof, to the said plaintiffs or otherwise, according to his writing obligatory and condition thereof, but to pay the same, or any part thereof, hath hitherto wholly refused and still doth refuse to the damage of the said plaintiffs five thousand dollars, and therefore they bring their suit, &c.

JOHN K. VALENTINE,
U. S. Attorney.

Enter rule to plead in eight days or judgment, sec. reg.

JOHN K. VALENTINE,
U. S. Att'y.

8 And afterwards, to wit, on the 28th day of August, A. D. 1886, the said defendant, by Francis D. Lewis and Charles E. Morgan, jr., esquires, his attorneys, make his pleas in the words and figures following, to wit:

Defendant pleads.

1. Nil debit.
2. Payment with leave, &c.

MORGAN & LEWIS,
For Defendant.

AUG. 28, 1886.

And afterwards, to wit, on the 24th day of February, A. D. 1887, it is ordered that a jury come and try the issue joined in this cause.

And thereupon, on the same day, come the parties aforesaid, by their

attorneys aforesaid, and the jurors of the jury aforesaid being called likewise come, to wit:

1 Adolphus G. Berringen,	7 Thomas Scattergood,
2 Samuel Keiser,	8 James Roach,
3 Wm. R. Valleau,	9 David Keiser,
4 Frank W. Brown,	10 John N. Logan,
5 Albion Foulds,	11 Herbert Welsh,
6 Maurice H. Matsinger,	12 James Harvey,

who are duly impanelled, returned, chosen, tried, and sworn or affirmed, to speak the truth in the issue joined in this cause between the United States of America, plaintiff, and Henry H. Stafford, defendant.

And afterwards, to wit, on the same day, the jurors aforesaid, upon their oaths and affirmations aforesaid do say, that upon the issue joined in this cause they find for the defendant.

And thereupon it is considered and adjudged that the said plaintiffs, the United States of America, take nothing by their said writ, and that the said defendant, Henry H. Stafford, do go thereof without day.

10 And afterwards, to wit, on the 29th day of March, A. D. 1887, on motion of the plaintiffs, by their attorney, John K. Valentine, esq., the judgment heretofore entered in the cause is opened and set aside.

And afterwards, on the same day, comes John K. Valentine, esq., attorney as aforesaid, and moves the court for a new trial, nunc pro tunc as of February 25, 1887, and assigns the following reasons:

I. Because the verdict was against the evidence.

II. Because the verdict was against the weight of the evidence.

III. Because the learned judge erred in submitting to the jury the question that it was for them to decide, under the evidence, whether

11 or not the Government had not settled with the defendant; and that if it had, he was not indebted to the Government, and they might find for the defendant.

And afterwards, to wit, on the 18th day of April, A. D. 1887, the cause is heard by the court, upon the said motion of the United States, plaintiff, for a new trial, and on the reasons in support thereof, and after argument thereon by the counsel for the respective parties, plaintiff and defendant, the new trial is refused, and the reasons are dismissed.

And thereupon it is considered and adjudged that the said plaintiffs, the United States of America, take nothing by their said writ, and that the said defendant, Henry H. Stafford, do go thereof without day.

12 And afterwards, to wit, on the 15th day of July, A. D. 1887, a bill of exceptions, tendered by the plaintiff and duly signed by the honorable the judge of the court here, being filed, is in the words and figures following, to wit:

13 In the district court of the United States for the eastern district of Pennsylvania, of May sessions of 1886, No. 8.

THE UNITED STATES OF AMERICA
vs.
HENRY H. STAFFORD.

Be it remembered, that in the said term of May, A. D. 1886, came the said plaintiff into the said court, and impleaded the said defendant in a

certain plea of debt, etc., in which the said plaintiff declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the district aforesaid, before the honorable William Butler, judge of the said court, on Thursday, the twenty-fourth day of February, A. D. 1887, the aforesaid issue between the said parties came to be tried by a jury of the said district for that purpose duly empannelled (prout list of jurors), at which day came as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid empannelled to try the said issue being also called, came, and were then and there in due manner chosen, and sworn or affirmed to try the said issue; and upon the trial the counsel of the said plaintiff offered in evidence a duly certified copy of the official bond of the defendant, Henry H. Stafford, receiver of public moneys for the district of lands subject to sale at Marquette, in the State of Michigan, as disbursing agent, and sureties, dated March 13, 1865, for the sum of five thousand dollars, conditioned—

14 "That whereas the President of the United States hath, pursuant to law, appointed the said Henry H. Stafford receiver of public moneys for the district of lands subject to sale at Marquette, in the State of Michigan, by commission dated the ninth day of March, 1865; and whereas the said Henry H. Stafford has also been appointed disbursing agent of the Government under the provisions of the act entitled 'An act requiring all moneys receivable from customs, and from all other sources, to be paid immediately into the Treasury without abatement or reduction," etc., approved March 3, 1849:

15 Now, therefore, if the said Henry J. Stafford shall faithfully execute and discharge the duties of his office as disbursing agent as aforesaid, and shall promptly and faithfully account for all moneys that may legally come to his hands for disbursement, then the above obligation to be void and of no effect, otherwise it shall abide and remain in full force and virtue.

Also duly certified transcripts of the account of the defendant as such disbursing agent from April 1, 1865, to May 15, 1869, which showed a balance due to the United States on May 15, 1869, of $1,202.66.

The transcript also showed that in the account current of the defendant for the 3rd quarter of 1867 he had claimed credit for the sum of $1,269.75 for fees on selections of land made by the Portage Lake and Lake

16 Superior Ship Canal Company in 1867; that his fees for the year 1867 exceeded the maximum compensation allowed him by the act of Congress, and that in his account current for the quarter ending June 30, 1868, he claimed credit for the same items of fees as due to him during the year 1868.

The certified copy of the bond and the transcripts were admitted in evidence.

Plaintiff rested.

Counsel for the defendant thereupon called as a witness for the defendant

HENRY J. STAFFORD, sworn.

By Mr. MOGAN:

Q. When were you appointed receiver of the land office at Marquette, Michigan.

17 A. I was appointed receiver of the land office in April, 1865. I was in the office four years, and went out of office in May, 1869. By virtue of holding the office of receiver of the United States land office, I became disbursing agent for moneys paid to the officers of the land office and incidental expenses. As disbursing officer, I paid the receiver's and register's fees. One per cent. on lands sold was allowed. All fees upon military bonds, land warrants, and other bonds connected with the office, the commissions were one per cent. The salary is $500 a year and $2,500 fees and commissions.

Q. That is, if you get anything above $500 it pays for the business you do?

A. Yes, sir.

Q. When did you account?

18 A. I rendered my monthly accounts to the General Land Office, embracing the registry receipts, declaratory statements, and other accounts coming under the receiver's office.

Q. How often?

A. Quarterly. I made my quarterly account current and quarterly accounts both to the Secretary of the Treasury, I think, and the Commissioner of the General Land Office.

Q. Did you do that regularly all through your term?

A. I did until the fire of 1868, which occurred on June 11th. Then we were obliged to close the office until August.

Q. What occurred at that fire? Where were your books and papers?

A. The books and papers of the land office, register and receiver, were all destroyed.

By the COURT:

Q. At what time?

19 A. June 11, 1868.

Q. That was when you went out?

A. No, sir.

By Mr. MORGAN:

Q. Just before you went out?

A. Yes, sir.

Q. And at that time, if I recollect, there was also some money in cash in the office, which was destroyed?

A. There was a sum which we estimated at about eighteen hundred and forty odd dollars, a portion of the money which was in a condition that I could send it on to Washington. I put in a $50 bill between two cigar covers and sent it on to the Department.

By the COURT:

20 Q. That was money belonging to the Government in your charge.

A. Yes, sir.

By Mr. MORGAN:

Q. Then an act of Congress was passed relieving you from any liability for the loss of that money, was there not?

A. In 1873.

Q. Now, as I understand you, you rendered these accounts regularly, the monthly accounts which you referred to, and also the quarterly accounts?

A. The quarterly accounts; yes, sir.

Q. Was there ever any objections made to your accounts?

A. During the first two years, I think, of my term of office I received two or three adjustments, but no objections to my accounts but once, and that amount I gave the Department credit for and charged it
21 to myself.

Q. That was during the early part?

A. I do not remember now.

Q. Then after that did you continue to render these accounts regularly?

A. I continued to render them during the term of my office.

Q. Was there ever any question as to their correctness raised?

A. There never was any question raised. I never received an adjustment or anything to the contrary, but what my accounts were perfectly straight until last June.

Q. When you heard that this suit had been brought against your brother-in-law, Joseph Lewis, and Henry Lewis?

A. Yes, sir.

22 Q. And then you instructed us to enter an appearance in your behalf?

A. Yes, sir.

Q. That was the first intimation you ever had as to the questioning of the correctness of your accounts?

A. That is the first intimation.

Q. You were afterwards, as I understand, after you went out of this office, appointed register?

A. In 1879 I was appointed register of the United States land office.

By the COURT:

Q. Ten years later?

A. Yes, sir.

By Mr. MORGAN:

Q. How long did you hold that office?

23 A. I held it four years and resigned.

Q. There has never been any question as to your accounts there?

A. No, sir.

Q. Your own accounts were all destroyed, as you said, by this fire?

A. Yes, sir.

Q. You have gone over these papers that have come from Washington, have you not?

A. Yes, sir.

Q. Is there anything due by you to the United States Government?

A. No, sir.

Q. Your accounts are all paid, according to the best of your understanding, in full, and settled?

24 A. They were.

Q. When you went out of office?

A. Yes, sir; and if anything, I have always claimed that if my accounts were property adjusted there was a balance due me.

By the COURT:

Q. Of how much?

A. From two to three hundred dollars. I have forgotten now the amount I submitted at the time.

Q. Why did you not have a settlement?

A. For the reason that I never received any adjustment from the Government. I received no notice, and the adjustment of the accounts ran along from quarter to quarter and from year to year, one year after another.

25 Q. The question is why, if you had the impression that the Government owed you some two hundred or more dollars, you did not apply for an adjustment of your account and a settlement that would show what was coming to you, and claim it?

A. My account does show in one instance a balance due me, but the accounts for the land office, if I remember rightly, were from two to three years behind in their work. It was impossible to get any work up.

Q. And you never applied for a final settlement?

A. No, sir; I expected an adjustment.

Q. Although you believed there was a balance due you?

A. Yes, sir.

Q. Why did you not apply?

26 A. It was left some time until after the adjustment arrived, that I could look over the matter and see whether I was correct in my ticking.

Q. Did you suppose that this could be ascertained from the records of the Government, or that your own books would be necessary to render a settlement?

A. There were a number of vouchers that were destroyed by the fire, which the Government did not have.

Q. Do you understand from that certificate on what it is that the Government bases its claim of deficiency?

A. The principal item of difference in the account arises in the second quarter of 1868. I credited there in my account the fees of the Portage Lake and Lake Superior Ship Canal Company, amounting to about $2,500—a little more, I think, and credit the register with $1,274 and the receiver with $1,274. I state at the time of my credit that the

27 fees were paid in the third quarter of 1867, in October. In 1867, to give a little explanation of the matter, P. J. Avery, as State agent of the Portage Lake and Lake Superior Ship Canal Company, came to the land office with a list of 200,000 acres of land to file, which was a grant given by Congress, I think, in 1863, to a company to build the Portage Lake and Lake Superior Ship Canal. In that grant it is specified that no lands should be mineral lands, or so designated by the Government. When the list was brought to the office the fees, as estimated by the register, were paid to me as receiver, as he is not allowed to receive money. After the list was put into the hands of the register to examine for final approval the register rejected it for the reason that he and the State agent

disagreed in regard to what were mineral lands, or so termed. The result was that the State agent took the list from the office and returned it home, or to his place of business. That amount was put in my fees and commission statement for 1867.

28 By the COURT:

Q. How much was it?

A. It was put down there to my credit at $1,274.69, to the credit of the receiver, and also the same amount to the credit of the register. In 1867, when the amount was put in, it had to go into my receiver's account as fees received. It went into my fee-statement account in 1867.

Q. The whole $2,500?

A. Yes, sir. It went through all my accounts as any other fees and statements, as if it was finally paid. In 1868, when the final certificate was attached, in the second quarter, in May—we were not entitled to the fees until such time as the final certificate was attached to the list and the proper entries made upon the books of the office—at that time I went back and brought forward this twelve hundred and some odd dollars, or rather twenty-five hundred and some odd dollars, giving the register
29 credit for one-half the amount and the receiver credit for the other half.

By Mr. MORGAN:

Q. That was in 1868?

A. That was in 1868, when the final list was brought in claiming that we were entitled to it that year. That made our maximum full for the year. In the adjustment I find later, in one of the adjustments there, that this $2,500 is thrown out of the account on account of its being put into my accounts in 1867.

By the COURT:

Q. That is, it is thrown out in 1868 because it was introduced in 1867?

A. Yes, sir.

Q. It should not, I suppose, have been introduced both years. In other words, you could only have had the one credit for it?

A. I did not receive any money in 1867.

30 Q. What do you mean when you say they threw it out?

A. They threw out in 1868, in the second and third quarters, this amount which we claimed was paid in 1867.

Q. And they credited you with it in 1867?

A. No; we credited ourselves.

Q. Did they not credit you with it also?

A. No, sir; in the adjustment they make no credit.

Q. They did not credit you with it at all?

A. No, sir.

Q. You say that appears by the adjustment, does it?

A. It appears in the adjustment of 1868.

Q. It appears there that they threw it out?

31 A. Yes, sir.

Q. Does it appear that it is not allowed in 1867?

A. In the adjustment, as I claim, they do not notice the amount.

Q. Was this thrown out altogether?

A. Yes, sir.
Q. You are stating the commissions on this sum?
A. The fees.

By Mr. VALENTINE:

Q. The fees which are commissions upon the sum?
A. Yes, sir.

By the COURT:

Q. I understood you to say that you received this money in the
32 year 1867, but that inasmuch as this certificate, I think you called it, for land on which it was paid was not approved, the matter was open and pending by reason of the disagreements between the two agents who had it in charge, and you improperly received the money, which should not have been received until the next year, as the money was not due the Government until the certificate was approved, so that while you held the money the Government was not entitled to it, and you held it virtually as a depository for the man who paid it to you and who was awaiting the approval of the certificate.

A. Yes, sir.

Q. And consequently, when the certificate was approved in 1868, you then credited the Government with it and turned it over and claimed your fees upon it; is that the fact?

A. No, sir; I credited the Government and turned it over at the time.

33 Q. You thought you made a mistake in that, and therefore it was that you corrected your account?

A. Yes, sir.
Q. Did you pay it to the Government in 1867?
A. I paid it to the Government.

Q. You treated it as money belonging to the Government received in 1867. That view of this subject will account for the difference between you and the Government, about, will it not?

A. Yes, sir.

Q. Have you any doubt that that is the source of the disagreement between your accounts?

A. That is the main difficulty.

By Mr. MORGAN:

Q. I want to ask you as to whether, irrespective of this matter,
34 your maximum was made up in 1867. That is, how much were your fees allowed you in 1867?

A. $3,000.
Q. They were allowed you?
A. Yes, sir.

By the COURT:

Q. And does this item cover the whole difference?
A. This item and a few small items.
Q. How much do they amount to?
A. This one item alone brings it within $33.80.
Q. Can you account for this $33.80 in any way?
A. I can only account for the difference between the amounts paid to

the register and receiver, and the amounts the receiver and register
35 received. I have the comparative statement here.

Q. Are you satisfied that if you have paid that you do not owe anything?

A. Yes, sir.

Q. In other words, if you were entitled to the fees out of this $2,400, as you claim, then you say you are entirely satisfied that you owe the Government nothing?

A. Yes, sir.

Q. And if you are not entitled to the fees, then upon that hypothesis there would be owing to the Government whatever you have received, by your own account, as fees on that account, and that only?

A. No, sir; I do not see that. The difference between the amount earned during my term of office, according to what purports to be copies of my statements from the Government office, amounted to $11,559.87 the amount received was $10,334.90, making a balance to the receiver of $1,224.97, a balance due me.

36 Q. You do not claim that there is a separate balance due you of $1,200?

A. That is what that shows; that is, leaving out the Portage Lake and Lake Superior Ship-Canal Company.

Q. It is perfectly clear, if I have understood you, that you have in your account retained the fees on this $2,400 or $2,500. How much were your fees on that?

A. It would have been about $1,000.

Q. Now the Government, in making up this account, has disallowed to you these fees?

A. Yes, sir.

Q. That, of course, accounts for the difference between you to the extent of $1,000? That is it, is it not?

A. Yes, sir.

Q. Then if you were not entitled to these fees, does it, or does
37 it not result that you are indebted to the Government in this sum of $1,000? That must follow unless, at the time you went out of office, the Government was largely indebted to you?

A. In making up this statement each year from 1865 to 1869, during my term of office, the receiver earned, according to my statements, $11,559.87, and the amount paid the receiver during that period was $10,334.90. The register received a portion of it; I paid him his portion of it.

By Mr. VALENTINE:

Q. You spoke of an amount of about thirty-odd dollars. What was that?

A. About thirty dollars in the adjustment that I could not account for. I accounted for it another way.

By the COURT:

Q. You say these fees amounted not to $1,200, but amounted to about $1,000; can you not ascertain exactly what they amount to?

38 A. If you will allow me to explain, there was nine hundred, nearly a thousand dollars that came to me to make my maximum

for the four quarters. There was a maximum for the register for three quarters only, a new register being appointed the first of May, the commencement of the second quarter. That left in the register's hands that I paid him, of this amount of money, four hundred and some odd dollars, and to my account, I think, was $904.07, if I remember right.

By Mr. VALENTINE:

Q. $930.31, the expert says?

A. Yes, sir.

By the COURT:

Q. So that is the only difference there is between you and the Government as to the fees?

A. That is all the difference.

Mr. VALENTINE. I am perfectly willing to reduce the amount here by $30.

39 By the COURT:

Q. When is the money due the Government, according to your experience of the office—due and payable?

A. Upon the final location and the certificate attached, signed by the register and receiver.

Q. The final location of the land?

A. Yes, sir.

Q. Then this money was paid in advance of the right of the Government to receive it?

A. Yes, sir; instead of retaining it in my hands until such time as the list could be properly certified to and entered upon the records of the office, I deposited it.

Q. Instead of retaining it, as you should have done, you say?

A. Yes, sir.

40 Q. Until the question was finally settled to determine the right of the Government, you paid it over?

A. Or, in other words, I should have rejected the fees at the time.

Q. In other words, you should have declined to receive this money from the party who desired to locate until the subject of his right to locate was settled?

A. Yes, sir.

Q. And therefore when you came to make up your fees you charged the Government in respect to this as if the money had been received by you and paid over when it was due?

A. Yes, sir. I was compelled to put it in my statements—in my disbursing agent's account as well as my fees statement. That was the rule of the office.

By Mr. VALENTINE:

41 Q. Are the lands not located before the sale?

A. No, sir; it is not a sale. It was a grant.

Q. They are located then?

A. They are located under that list.

Q. It is called a grant? That is, in fact, a sale, is it not? A purchaser can get possession under it and he gets a certificate?

A. Yes, sir.

Q. Then the lands are located?
A. Yes, sir.

By the COURT:

Q. When the certificate is finally issued?

Mr. VALENTINE. Before the sale the lands are located.

42 By the COURT:

Q. Who issues this certificate?

A. The State agent issues the certificate. Do you mean the final certificate?

Q. The certificate that was brought to you?

A. I will explain that matter to you. This certificate is a certificate of the register and receiver certifying that these lands are free and are subject to this list of the company, that they are the same as certified by the list, and when that list is properly signed the lands are entered upon the records of the office as belonging to this corporation or person or persons to whom the certificate is owing, and in this case, owing to the disturbance which arose, of course the moneys were deposited, which I have explained before; but the register and receiver are not entitled to any moneys until the location and the certificate is attached.

43 Q. In other words, there was no final certificate rendered?

A. Until 1868.

Q. And the matter was pending, and while it was pending this money was paid?

A. Yes, sir.

By Mr. VALENTINE:

Q. You were the agent of the United States?

A. Yes, sir.

Q. Whom did these lands belong to?

A. They belonged to the State of Michigan as trustee.

Q. As trustee for the United States?

A. As trustee for the United States.

Q. What quantity of lands were there there?

44 A. 200,000 acres.

Q. Now it was of that particular grant that you had charge as the disbursing agent, was it?

A. Yes, sir.

Q. For the sale of those lands?

A. The application or grant.

Q. Receiver of public moneys for lands subject to sale at Marquette, in the State of Michigan. You say these lands then belonged to the State of Michigan in trust for the United States?

A. Yes, sir.

Q. And you were to get the money?

A. Yes, sir.

Q. Now explain how the title then passed out of the State to the citizen who bought the lands; explain the process; what was done?

45 A. The State of Michigan appointed a State agent to make a selection of land under the grant.

Q. To make a selection for the State? I thought all the land there

under this arrangement between the United States and Michigan belonged to Michigan. You said the State appointed an agent to make a selection; was that for the citizen who was about to purchase?

A. No, sir. Under all grants of lands to railroads, harbor improvements, or canals, the building of canals, the State in which the land is located the Government gives it to as trustee to hold for the company or corporation. At such time as the railroad or canal is finished the State appoints an agent. The Government signs a certificate and he presents that to the Land Office to examine the records of the office to see what lands he can select that are embraced within the boundaries of his limit. As a rule, all railroads are limited, and this company was limited to the lands.

46 Q. What company was that?

A. The Portage Lake and Lake Superior Ship Canal Company. They were limited to the lands nearest the canal, and also that their grant was not to embrace any mineral lands.

Q. Now there was an agent appointed then by the State?

A. Yes, sir.

Q. Then what was the next step after that?

A. After he had come to the office he made his selection. He makes a list; he takes the lands that are vacant within the limits prescribed by law and makes his list out, puts down the descriptions of the lands until he gets his 200,000 acres. After he makes out his list he tenders it to the register of the land office for final location, or any other term that you can use, or selection.

47 Q. As to this list that you speak of, was not that a selection upon particular or certain lands that are marked upon these maps that you have of all these lands? Did not the State agent make a selection?

A. Yes, sir; for the canal company.

Q. That is the process that you have been describing?

A. Yes, sir.

Q. Then it is returned to the land office, and then it is either confirmed or not confirmed, I suppose, there?

A. No, sir; he makes his selection; and it is not returned to the General Land Office in Washington.

By the COURT:

Q. It is returned to the register, is it not?

A. Yes, sir; he is in the land office all the while.

48 Q. And the register and receiver then go over this list for the purpose of ascertaining whether the State agent has included in the list anything that is not allowed by the act of Congress?

A. Yes, sir.

Q. And in this instance the agent had included, as I understand you, lands that the register said contained minerals?

A. Yes, sir.

Q. And were, therefore, excluded?

A. Yes, sir.

Q. And that was what postponed the settlement of the transaction until the next year?

A. Yes, sir.

Q. But in the mean time who paid into the office this money?

49 A. The State agent.

Q. Upon the granting of the certificate is the money paid over by the State agent to the land office?

A. It is paid over. I may be mistaken there.

Q. The railroad company gets the land without any payment, does it not?

A. No, sir; the corporation furnishes the money for the fees upon the location of these lands.

Q. Then these moneys are fees?

A. Yes, sir.

Q. They are the fees of all the officers of the Department?

A. Yes, sir.

Q. And the State agent pays that, does he?

A. Yes, sir.

50 Q. And what you say here is that when this certificate of the State agent, designating what he claimed to take of these lands, was presented, he paid this amount of money, these fees?

A. Yes, sir.

Q. But when the representatives of the Federal Government, the register, came to look at the subject, as it was necessary he should do, and unite in the certificate, he declined to unite in the matter, and it laid over?

A. Yes, sir.

Q. Nothing was done?

A. Nothing was done, whatever.

Q. That was not completed until the next year, but in the mean time the money had been paid and you held it?

A. Yes, sir.

51 By Mr. MORGAN:

Q. You deposited it, as you are obliged to do with all fees?

A. Yes, sir.

By the COURT:

Q. And when the register unites with the State agent in this certificate, then the title of the Government is gone, the matter is complete?

A. No, sir; the register and receiver. The State agents go through a list in the office.

Q. When he and the register have united in the certificate certifying the land that has been taken by the State as trustee and the fees are paid does not that dispose of the matter?

A. Not without the receiver's signature. It is the register and receiver instead of the register and State agent.

52 By Mr. MORGAN:

Q. Is that the location, as you term it?

A. That is the location.

Q. Is that the final location?

A. Yes, sir; as far as that office is concerned.

By Mr. VALENTINE:

Q. Is not the selection by the State agent what you call the final location of the land?

A. No, sir; not until approved by the register and receiver.

Q. Were not your fees paid always upon this selection by the State agent?

A. Yes, sir.

53 Q. And did you not charge and have allowed your fees through all your accounts there for that year, in the year in which this location was made, or this selection, in fact?

A. Yes, sir.

Q. And that was the uniform method, was it not?

A. Yes, sir.

Q. Now, if what you call the approval of the register and receiver had not been given for ten years afterwards that would have been immaterial as to your charge, would it not?

A. Yes, sir; immaterial as to my charge in 1867.

By Mr. MORGAN:

Q. You mean you would have the right to the money even if it had not been located for ten years?

A. I do not understand you.

By the COURT.

54 Q. You can state whether in your experience it was or was not the practice of the Government in the office to carry the fees over in this way from one year to another where the final location, as you term it, was not made. Do you know any other instance of it?

A. No, sir.

Q. This is the only instance?

A. That was the first transaction that our office had of that kind.

By Mr. MORGAN:

Q. As I understand you, then, there is first the presentation of the list to the receiver and the register, then they examine it, and then if they approve of it they locate it, is that it?

A. Yes, sir.

55 Q. And the location is the location which takes place after their examination of the list and their conclusion that it is proper for the company, or applicant, or whoever it may be, to have the land?

A. Yes, sir.

By the COURT:

Q. In 1868, I suppose, you made a return to the Department at Washington of your receipts and disbursements for the year 1868?

A. Yes, sir.

Q. Did you carry this transaction over in your account that you returned to Washington?

A. Yes, sir.

Q. Showing that you had carried it forward and had charged fees, but not as of that year?

A. Yes, sir. My statement refers to it.

Q. Does that appear in any papers here?

A. Yes, sir.

56 Q. In what papers does that appear; in the second quarter of 1868?

A. Yes, sir.

Q. You say that in the papers certified from the Department at Washington and now before the court, it appears that your account for the year 1868 did contain this item here under consideration, and your charge of fees or compensation on that account?

A. I mean to say that the copy of my quarterly account shows that that amount is charged to the Government and credited to me, and a notation made referring back to it that the money was deposited.

Q. That was in 1868 that your account contained that?

A. 1868; yes, sir.

Q. And with a note referring back, calling attention to the fact that this was the money that was received the preceding year?

57 A. Yes, sir; here is the notation. I will read it: "Portage Lake and Lake Superior Ship Canal Company, list No. 1, under act of March 3, 1865, $1,274. (Fees paid and reported third quarter of 1867.)" That is, fees upon the list were reported then and the amount paid.

Q. But your return in 1868 shows that in 1868 you claimed the fees? This is the 1868 report?

A. Yes, sir.

Q. Then, as I understand it, this account with the Government in 1868 shows that these fees and $1,000, or something like that, upon this sum, were charged that year upon money received the preceding year on account of these lands, and the Government thus had notice?

A. Yes; prematurely received.

By Mr. VALENTINE:

Q. Do you know of your own personal knowledge that what you call the final location, that is, the approval of the register and

58 receiver for these particular lands, was in the year 1868?

A. Yes, sir.

Q. You know that?

A. Yes, sir; I have been to Washington and hunted up the original list that was filed in 1868 and stated May, 1868. The certificate is in my handwriting, signed by the register and receiver.

Defendant rested.

Counsel for the plaintiff called in rebuttal.

GEORGE T. BAXTER sworn.

Mr. MORGAN. What do you propose to prove by this witness?

Mr. VALENTINE. I want to ask him as to the practice in the

59 Department at Washington as to what is called final location.

By Mr. VALENTINE:

Q. What Department are you connected with?

A. I am connected with the First Controller's Office, and we review the work of the General Land Office, all the receivers' accounts, and everything; every transaction involving money matters.

Q. The Controller of the Treasury?

A. Yes, sir; the First Controller of the Treasury.

Q. What experience have you had; how long have you been there?

A. I have been on this class of accounts for—it was two years last December; two years and three months now.

By the COURT:

60 Q. That is, your knowledge about the business of the Department extends over two years and three months?

A. Of this class of accounts.

By Mr. VALENTINE:

Q. You had experience before that in reference to other classes of cases?

A. In reference to other matters since 1880.

Q. In the adjustment of the accounts of receivers as to that compensation of one dollar for each final location "by States and corporations under grants from Congress for railroads and other purposes, except for agricultural colleges, a fee of one dollar for each final location of 160 acres to be paid by the State or corporation making such location," what is the practice in the Controller's Office as to the allowance of that fee; when is it credited?

A. That fee is always allowed when the location is made.

61 By the COURT:

Q. When is the location made?

A. The location is made by the agent; when he makes his location out in the State he pays the money to the receiver.

Q. Do you know anything at all in the Department of the time when he does make his location, as you call it, irrespective of the acts of the receiver and the register? Do you know anything at all about his acts until the matter has been finally disposed of by him and the register and receiver together, or, in other words, does the receiver or register or anybody else connected with the Department know anything pertaining to the subject until there has been final action on the part of the three officers referred to?

A. No, sir; we get that in their accounts.

Q. That is the final location, and it comes to you, or your first knowledge is obtained after it is made final, by the action not only of the State

62 agent but as well of the receiver and the register of the land office there? In other words, no return is made to you by the receiver until final action has taken place?

A. That is put in their accounts, and we act on the accounts and all the circumstances surrounding them.

Q. It is the receiver who makes the return to the land office is it?

A. The receiver, yes; sir.

Q. Do you know any instance in which the receiver has made a return to the land office while the question of location was pending between the receiver and the register and himself?

A. No, sir; it comes up with the account. Then the fee is allowed in the account for that time, it may be two years, or it may be three years. The cases that I have had, this case was acted upon before I came in the office, but other cases we have had exactly similar to this that part of the the selection may be confirmed and part may not. The fees and commis-

sions are charged at that time, and it may be two years afterwards when they make another selection.

63 Q. That is where the interference takes place at Washington, after the fees have been paid is it not?

A. Yes; sir.

By Mr. VALENTINE:

Q. Now, I understand that there is no return then other than the receiver making a return of his fees until after it has been approved by the register and receiver?

A. He has to make his return every month and every quarter of the fees he has received.

Q. But there is no return of the action until after approval by the register and receiver of the location?

A. No return to the Department, but he is required by law to make those returns and every cent received every month and every quarter.

By the COURT:

64 Q. Do you know from any knowledge which you possess of the office when the land department was informed of the final location of these lands?

A. No, sir; the papers that I have before me do not show that.

By Mr. VALENTINE:

Q. Did you make an examination in preparation for coming here so as to be able to answer that question?

A. Of that particular question.

Q. Yes, sir.

A. No, sir; I did not. The only examination I made was of each account, a very hasty examination last evening.

By the COURT:

Q. That would not appear?

A. That would not appear, but the receiver is required by law and the Treasury Department every month to make those returns.

65 Q. That is, to make a return of the money received?

A. Yes, sir.

Q. I do not suppose these accounts would show anything of them?

A. They would not show. The presumption is that the final location is made always when the fees and commissions are in the account, and I can not see any ground for deducing anything to the contrary.

Q. That is so because I apprehend that they ought not to be paid until there is a final location, and therefore, when you find them paid you infer that there has been a final location?

A. Well, it is conclusive evidence that they were paid at the proper time.

By Mr. VALENTINE;

66 Q. Where is the return of the selection by the State agent and of the approval by the register and receiver made to in Washington. To what particular officer of the Department?

A. The State agent, the register furnishes him the records of the office showing what lands are vacant. Then he selects these lands, and as he

has been assisted by the register and receiver, they approve that and send it on to the Commissioner of the General Land Office, when they take action on it, and the money transactions and their executive actions are kept entirely different. The Department of public moneys under the Secretary of the Treasury has jurisdiction of that matter entirely.

By the COURT:

Q. When it is final and sent on to Washington, it goes upon the records there?

A. Yes, sir, and that has nothing to do whatever with the fees and commissions received, their monthly and quarterly transactions, nothing to do with this question that the defense has raised.

67 By Mr. VALENTINE:

Q. To whom did you say this certificate of the receiver and register was sent?

A. The register and receiver send his action to the Commissioner of the General Land Office who approves or disapproves of their action.

Q. And is there any officer superior to the Commissioner who had also the right to review this action?

A. Yes, sir, the Secretary of the Interior. The law gives him the power to review or approve the action already taken by the other officers, the register and receiver and the Commissioner of the Land Office, and it may be a year or it might be ten years before the matter was finally determined. There are land grants now in New Mexico and southern California that have been pending ever since the grant has been made, since the Louisiana purchase was consummated, and some of them since the Mexican annexation, Spanish land grants, some of them, dating back 200 years and not settled yet.

HENRY H. STAFFORD, recalled for the defendant.

68 Q. When was this certificate that Mr. Baxter has referred to by you as receiver and the register, sent to the Land Office?

A. In the second quarter of 1868.

Q. There was none sent in 1867?

A. No, sir.

By Mr. VALENTINE:

Q. Did you not receive notification of the rejection of this claim of yours to have this credit allowed?

A. No, sir; I did not.

Q. Never?

A. Never until last June.

By Mr. MORGAN:

Q. Until suit was brought?

A. Until suit was brought.

69 Q. That was the only notice you ever had?

A. Yes, sir.

By Mr. VALENTINE:

Q. I am speaking of this particular item?

A. I am speaking of this particular item.

Q. Did you never hear in conversation with any body that any part of it was rejected?

A. I had no knowledge of it whatever.

Q. And never received any communication as to it whatever?

A. No, sir.

GEORGE T. BAXTER recalled for the plaintiff.

By Mr. VALENTINE:

Q. What do you know upon that subject as to notification?

70 A. I know well that an account is never settled in our office.

By the COURT:

Q. Do you know anything about any communication with this man on on this subject?

A. No, sir; I can not say that I do; but I know what the custom of the Department is.

Q. You have never had any communication with this man?

A. No, sir. If I had had time when I was notified, I could have brought the records showing that the man has been notified. If you have a continuance of the case until to-morrow morning, I can produce the records.

By Mr. VALENTINE:

Q. You do not know that Mr. Stafford was notified; you only know that there were certain copies of letters which you saw which were in existence?

71 A. Yes, sir.

Q. Certain copies of letters as to these particular accounts? Do you know whether it was as to this particular item?

A. No, sir; I do not know anything about that particular item, only what the custom was.

Q. You only know that there was a notice?

A. A notice.

Evidence closed.

Whereupon Judge Butler then charged the jury orally, as follows:

Gentlemen of the jury: The same may be said of this claim as has been said of other claims on which suits have been brought and tried before you during the present term, that it is an old and stale matter, so old that it is difficult indeed to get at the truth respecting the rights of the parties.

72 It appears from the testimony which you have heard, that this defendant, in March or April, 1865, was appointed receiving and disbursing agent of the Government in the land office at Marquette, Michigan. He went out of office in May, 1869, some seventeen years ago. Now a claim is made against him on account of moneys received during the time he held this office, the principal of the sum amounting to about $1,200.

He tells you, and there is no evidence to the contrary, that he never heard that the Government had any claim against him on this account, nor that there was any dissatisfaction with the settlements he had made. He was required to make monthly returns to the Government, as I understand from the evidence. He says he did so, and that from the time he

went out of office in 1869, until this suit was brought, a few months ago, he never heard that the Government was dissatisfied with the discharge of his duties, or held him to be liable for the payment to it of any money whatever. Suit was then brought against him, and against his sureties.

On behalf of the Government, and to sustain this suit, a certified copy of the record is sent here from the proper Department in
73 Washington, which record shows a balance due on settlement of the defendant's accounts in the sum claimed.

It appears that at some time—it may be inferred, very lately—somebody has overhauled this account. What the object can be in allowing transactions like this to sleep, accounts like these to pass as accurate until the lapse of such a time, and then, when they have grown dusty and musty, and when individuals who could explain anything about them which might require explanation are dead and gone, going back, hunting them up, and making an examination at so late a day, it must be difficult for anybody to understand.

These certificates are by act of Congress made sufficient prima facie evidence of the indebtedness of individuals who have been in office under the Government, and whose accounts, upon examination, are found to show that money is due. It makes no difference how much time has elapsed, as there is no statute of limitations running against the Government for the protection of those who have dealings with it. After a period of seventeen years, as in this case, or after a period of twenty-five or thirty years, suit may be brought, and these certificates, where they are unan-
74 swered, will sustain the claim. Unless there is something to call the accuracy of the certificate into questions, the evidence must be held sufficient. In this instance seventeen years have elapsed. Fortunately, the officer who is sued, together with the sureties, is alive, and such light as he is able to shed upon the transaction after the lapse of so much time you have.

The principal part of the difference between the Government and the defendant, as you have seen, arises out of a difference respecting their rights. It appears that in the year 1867, the defendant received for the Government a sum of between $2,400 and $2,500. He did not charge compensation on account of it in that year, 1867. He believed it to be his right to introduce the matter into his accounts with the Government for the next year, and charge compensation for it as if it had been received then.

Now, I do not think I need go into a more minute explanation of this or of the reasons why the defendant thought he had a right to do this. It is quite manifest that he did think he had a right to do it, for he did not do anything under hand; it was all above-board, with information
75 to the Government of what he was doing. My judgment is that he had no right to do it; that he was wrong in claiming compensation on this account as if the money had been received in 1868; and I need not say why I think he was wrong. He acted upon his own judgment. He claimed that it was a proper construction of the statute; that this money was not due to the Government until 1868, when the final location of the lands, on account of which the money was paid, was made. His judgment was that as the location was not made until 1868, the money was not due the Government until then, and that inasmuch as the money was not due the Government until that time, he should not have

received it and paid it over, but having received it and paid it over, he believed it to be his right to carry it into the transactions of the next year, or the next quarter, and charge his fees upon it as if paid then. He could not charge anything on account of it in 1867, having already received his maximum. That was his claim as against the Government, and when he came to make his settlement, that is his return to the Government of moneys received and disbursed in 1868, he introduced this sum and claimed commissions or compensation under the statute, as being
76 due to him at that time; and the Government did not object but acquiesced until it brought this suit.

I submit to you the question whether or not the Government settled with him upon that hypothesis; if it did, he owes nothing on this account. Was there or was there not a settlement? Here was an account rendered to the Government, the whole transaction was put upon its face, and in it he said, "This sum of money charged by me for fees or compensation is on account of the sum of $2,400 received at a certain time, one year ago, or the preceeding year, 1867." Now with that knowledge staring it in the face, defendant's account was allowed to go as if settled, as if the Government accepted this interpretation of his and its rights under the statute, and allowed to rest for seventeen years. Was this a settlement? The Government understood what it was doing. Should it or should it not be held as having settled this transaction? To the court it seems just to take the conclusion that the Government chose, whether right or wrong, to put this interpretation upon the statute, and upon their right, as claimed by the defendant. If you take that view of it, you may render a
77 verdict for the defendant. As respects all else the defendant says he owes nothing, and is confident he transferred to the Government every dollar he received which belonged to it. Otherwise, you will render a verdict for the plaintiff for the amount of its claim, principal and interest.

And thereupon the counsel for the said plaintiff did then and there except to the following portion of the said charge, viz:

"That was his claim as against the Government, and when he came to make his settlement—that is, his return to the Government of moneys received and disbursed in 1868—he introduced this sum and claimed commissions or compensation under the statute as being due to him at that time, and the Government did not object but acquiesced, until it brought this suit.

I submit to you the question whether or not the Government
78 settled with him upon that hypothesis; if it did, he owes nothing on this account.

Was there or was there not a settlement? Here was an account rendered to the Government; the whole transaction was put upon its face, and in it he said: "This sum of money, charged by me for fees or compensation, is on account of the sum of $2,400, received at a certain time, one year ago, or the preceding year, 1867."

Now, with that knowledge staring it in the face, defendant's account was allowed to go as if settled, as if the Government accepted this interpretation of his and its rights under this statute, and allowed to rest for seventeen years.

Was this a settlement? The Government understood what it was doing. Should it or should it not be held as having settled this transaction?

To the court it seems just to take the conclusion that the Government chose, whether right or wrong, to put this interpretation upon the
79 statute, and upon their right as claimed by the defendant.

If you take that view of it you may render a verdict for the defendant.

And thereupon the counsel for the said plaintiff did then and there except to the aforesaid charge and opinion of the the said court, and inasmuch as the said charge and opinion, so excepted to, do not appear upon the record—

The said counsel for the said plaintiff did then and there tender this bill of exceptions to the opinion of the said court, and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge at the request of the said counsel for the plaintiff did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this thirteenth day of May, A. D. 1887.

WM. BUTLER. [SEAL.]

80 And afterwards, to wit, on the 9th day of August, A. D. 1887, an assignment of errors, and a prayer for reversal of judgment being filed, is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Plaintiffs in error,
vs.
HENRY H. STAFFORD.

Assignments of error and prayer for reversal of judgment.

Because the learned judge erred—

1. In charging the jury that the Government did not object, but acquiesced, until it brought this suit in the defendant's claim for commissions or compensation as due him in the quarter ending June 30, 1868, on moneys received and disbursed by him in 1867.

2. In submitting to the jury the question whether or not, the
81 Government had settled with the defendant by reason of its not having brought suit for seventeen years from the time when the defendant had rendered his account.

3. In charging the jury that, to the court, it seemed just to take the conclusion that the Government chose, whether right or wrong, to put the interpretation upon the statute that was claimed by the defendant, and that if they took that view of it, they might render a verdict for the defendant.

And the plaintiff in error pray that the judgment entered in this cause be reversed, annulled, and altogether held for nothing, and that they may be restored, &c.

82 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

I, Charles S. Lincoln, clerk of the district court of the United States for the eastern district of Pennsylvania, do hereby certify that the annexed

and foregoing is a true and faithful copy of the record and proceedings in the said court in a certain action of debt therein lately depending wherein the United States of America is the plaintiff and Henry H. Stafford is the defendant, as full and entire as the same now remain of record in said court.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said district court at Philadelphia this seventh day of September, A. D. 1887, and in the one hundred and twelfth year of the Independence of the said United States.

[SEAL.] W. W. CRAIG,
Pro Clerk.

83 THE UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

The President of the United States to the judge of the district court of the United States for the eastern district of Pennsylvania, greeting:

Because that in the record and process and also in the rendering of judgment in a suit before you between the United States of America, plaintiff, and Henry H. Stafford, defendant, in a plea of a manifest error has intervened to the great damage of the said The United States of America, as in its complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the party aforesaid in this behalf:

84 You are hereby commanded that, if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, sitting at Philadelphia, on the first Monday of October next (1887), that, the —— record and process aforesaid being inspected, they may cause to be done what of right ought to be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, at Philadelphia, this 9th day of August, A. D. 1887, and in the 112th year of the Independence of the said United States.

[SEAL.] W. VONN A. WILLIAMSON,
Pro Clerk Circuit Court U. S.

85 (Endorsed:) No. 1, October sess., 1887. C. C. U. S., E. D. of Pa. The United States, pl'ff in error, vs. Henry H. Stafford, def't in error. Writ of error. Brought into clerk's office dist. c't U. States, Aug. 24, 1887. W. W. Craig, pro clerk.

86 THE UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

To Henry H. Stafford, greeting:

You are hereby cited and admonished to be and appear at a circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, to be holden at Philadelphia on the first Monday of October next (1887), pursuant to a writ of error filed in the clerk's office of the dis-

trict court of the United States for the eastern district of Pennsylvania, wherein the United States of America is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned shall not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand this ninth day of August, A. D. 1887.

WM. BUTLER, *Judge.*

87 We accept service of the within citation and request the clerk to enter our appearance for the defendant in error.

MORGAN & LEWIS.

AUG. 24TH, 1887.

(Endorsed:) No. 1, Oct. sess. 1887. C. C. U. S., east. dist. of Pa. The United States, pl'ff in error, vs. Henry H. Stafford, def't in error. Citation. Brought into clerk's office dist. c't U. States Aug. 24, 1887. W. W. Craig, pro clerk.

88 And afterwards, to wit, the 29th day of October, A. D. 1887, come the parties aforesaid, and this cause being called for argument, and having been argued by counsel for the respective parties and duly considered by the court, it is ordered that the judgment of the district court of the United States for the eastern district of Pennsylvania, be and the same is hereby, affirmed.

89 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct.:

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of the United States of America, plaintiff in error, vs. Henry H. Stafford, defendant in error, of October session, 1887, No. 1, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia, this fourteenth of December, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

[SEAL.] SAMUEL BELL,
Clerk of C. C.

(Indorsed:) No. 312. The United States, plaintiff in error, vs Henry H. Stafford. E. Pennsylvania C. C. U. S. Filed December 19, 1887.

Office Supreme Court U. S.
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JAMES H. McKENNEY
CLERK

BRIEF OF DEFENDANTS IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 354.

THE UTAH AND NORTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

LINNE M. PALMER AND ALFRED MERLE PALMER, AN INFANT, BY WM. F. FISHER, HIS GUARDIAN AD LITEM, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF IDAHO.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 354.

THE UTAH AND NORTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

LINNE M. PALMER AND ALFRED MERLE PALMER, AN INFANT, BY WM. F. FISHER, HIS GUARDIAN AD LITEM, DEFENDANTS IN ERROR.

BRIEF OF DFFENDANTS IN ERROR.

This was an action commenced in the District Court of the Third District of the Territory of Idaho, by the plaintiffs (defendants in error here). The second amended complaint states the cause of action on the part of the plaintiffs.

It alleges in substance that the plaintiffs are the only heirs of William O. Palmer, deceased. That W. F. Fisher was the duly appointed Guardian ad litem of the infant plaintiff, Alfred Merle Palmer. That the defendant is a corporation owning and operating a line of railway from Ogden City, Utah Territory, to Garrison, Montana. That it was a common carrier of passengers; that on the 11th day of December, 1885, W. O. Palmer was a passenger in one of the cars of the defendant on said railway; that Palmer was such passenger in Bingham County, and the defendant negligently, carelessly and unskillfully threw the car in which Palmer was riding off of the track, by reason of a broken rail, which the defendant carelessly and negligently permitted to remain upon the track. That Palmer was killed. That such killing was without fault on his part. That he died intestate. That the plaintiffs were damaged by reason of the premises in the sum of forty thousand dollars.

The defendant answered and denied that William O. Palmer was a passenger on any car of the defendant, at the time stated in the complaint. Denied that while he was such passenger the de-

fendant carelessly, negligently or otherwise threw the car off of the track, or overturned it, either by reason of a broken rail or otherwise. Denied also the killing of Palmer; and denied that the killing was without fault or negligence on the part of Palmer, and denied that the plaintiffs had been damaged in any sum.

This made up the issues upon which the case was tried.

See pages 8, 9 and 10 of the printed record.

The case was tried to a jury, who found a verdict for the plaintiffs in the sum of sixteen thousand, seven hundred and two dollars and eighty-five and five-sevenths cents, and judgment was entered upon this verdict.

Afterwards the plaintiffs voluntarily remitted all of said judgment and verdict in excess of ten thousand dollars.

The testimony upon the trial was in brief by Samuel F. Taylor; that he was going north on the night of December 11th, 1885, or rather the night between the 10th and 11th of December, 1885; that between Market Lake, Camas, at near Hawgood, he noticed a violent jerk of the train and lurch of the car as if the wheel had passed over some obstruction.

Tim Farrell, on behalf of the plaintiffs, testified that he was conductor on the train going north on the same night, being the night of December 10th. That at the place described by Taylor he observed the lurch of the car and called it a bad joint; when he reached Camas, which was the next telegraph station, he delivered the telegraph operator a dispatch, to be sent to the train dispatcher, as follows;

"Bad place in track about five miles east of Hawgood."

This he testified was to notify trains of the bad place in the track that they could be on the lookout before reaching it. The passenger train going south met the one going north at a point north of Camas. The dispatch left by Farrell was never sent to the train dispatcher—at least no notice of it was ever given to the passenger train going south.

It was delivered to the freight train which didn't go south until after the passenger. When the passenger train from the north reached Camas, the conductor, on entering the station, observed this notice or telegram, sent by Farrell. He asked the agent about it, and the agent told him he knew nothing at all about any bad place in the track. The message was hanging on the hook at the time.

Flanders was conductor on the train going south. When the train reached the point four or five miles south of Hawgood, it struck the broken rail and was wrecked, the cars being thrown off the track and into the ditch.

The deceased, W. O. Palmer, was working with an outfit train as a carpenter, and was sidetracked at Camas that morning. He got on the passenger train on which Flanders was conductor going south to perform some company work. When the cars were overturned Palmer was thrown out through a window and his neck broken.

It was also shown in the testimony that Palmer was a young man, 24 years of age; in good health; and excellent habits. That his expectancy of life was about thirty-seven years—from thirty-seven to forty years. That he was earning at the time $2.85 per day and averaged twenty-eight working days per month. His board cost him $5.25 per week.

It was also shown on the part of the plaintiffs that the wreck was caused by reason of a broken rail, and that it occurred at about the distance from Hawgood, stated by Farrell in his testimony and dispatch.

This was the substance of the testimony on the part of the plaintiffs, and is embraced in the printed record, beginning on page 17 to and including 50.

On the part of the defendant it was attempted to be shown that the bad place in the track designated by Farrell, and about which he had left the telegram was another and at a different place from that where the train was wrecked. It was also shown that Farrell was not positive as to the exact locality which he designated the bad place. That it was in the night time, and the ground was covered with snow. That appeared upon his cross examination as witness for the defendant. There was also an attempt to show by the roadmaster that the frost broke the rail. It was also shown that the rails were of only thirty-five pounds weight to the yard—engines being run over them weighing about thirty-five tons. It was also shown on the part of the defendant that Palmer was engaged in the employ of the Union Pacific Railway Company as carpenter and was paid by it and was working for it at the time that he was killed. That he was traveling on a pass issued by the Union Pacific Railway Company, the pass being issued to G. W. Barraclough.

That was the substance of all of the testimony.

The court thereupon charged the jury fully the instructions being found on pages 98, 99, 100 and 101 of the printed record.

A new trial having been refused, an appeal was taken to the Territorial Supreme Court; where the judgment was affirmed.

The opinion of the Territorial Supreme Court is found on pages 110, 111 and 112; and this opinion discloses the fact that the case was first tried in the District Court in 1886, and on appeal to the

Supreme Court a new trial was granted and that it was tried the second time at the May Term of 1887 in the District Court and the judgment here appealed from was rendered at the second appeal to the Territorial Supreme Court.

There is no error assigned in this court upon the ruling on demurrer.

We will take up the errors assigned in the order in which they are stated in the petition in error.

First—Is the verdict excessive?

The statutes of the Territory of Idaho, at the time this cause of action arose, and at the time the case was tried, contained the following provision:

"When the death of a person.....is caused by the wrongful act of another, his heirs or personal representatives may maintain an action for damages against the person.....causing the death. In such action such damages may be given as under all the circumstances of the case may be just."

See section 4100, Revised Statutes of Idaho.

This would seem to be a legislative declaration that the judgment of the jury was the standard and measure of damages intended to be established.

It is not pretended that the verdict can be set aside as being excessive, unless it appear that the verdict is so unreasonable as to warrant the conclusion that the jury were influenced by passion or prejudice.

It seems to me that at any time it is a very delicate undertaking for a court to set aside the verdict of a jury because it is excessive, when there is no particular standard by which the injury can be measured in money.

I don't claim that the jury are warranted in giving anything except to compensate for the pecuniary injury done. In fact, that is exactly what the action is given for; it is to recompense the heirs or those entitled under the statute for pecuniary injury they have sustained.

In this case it is claimed that the loss is not equal to the verdict given. The verdict of the jury will not be set aside by the court upon the ground that the damages are excessive, unless they are such as to at first blush to appear excessive.

Indianapolis Ry. Co. vs. McLinn, 8 Am. and E. Ry. cases, 237.

Where there is evidence tending to sustain the findings of fact of amount of damages, the court will not weigh the proof, unless

the verdict is of such character as to induce the belief that it is the result of passion or corruption.

Sheehy vs. Kansas City Ry. Co., 32 Am. & Eng. Ry. cases 233.

In the case or Porter vs. Hannibal, etc., Railway Company, 2 Am. and Eng. Ry. cases, 44, $10,000.00 was not held to be excessive for causing death.

In the case of International Ry. Co. vs. Ormond, ~~23~~ 27 Am. and Eng. Ry. 139, the court held that a verdict for $12,000.00 for killing a man who was keeper of a section house, and whose earnings were from $55 to $100 per month was not excessive.

There was no impropriety in the remission of that portion of the verdict in excess of $10,000.00.

See Huston Ry. Co. vs. Maddox, ~~2~~ 21 Am. and Eng. Ry. cases 625.

We don't believe that this court can hold upon this, the second trial of the case that the verdict of the jury is excessive.

The next error assigned is that the District Court erred in denying defendant's motion to amend its answer, and that the Supreme Court erred in sustaining this decision.

First—We would say that matters of amendment largely rest in the sound discretion of the court, and where they have been offered in the trial court and denied, it is a rare case where a judgment has ever been reversed on account of such refusal or denial; but in this case there are special reasons, as appear by the opinion of the Supreme Court (on page 111.) The answer made up the issues on which the case was tried in the first place and upon which the verdict was rendered; the case was taken to the Supreme Court on such issues and was there reversed and sent back to the District Court for a new trial. It was after it had been returned to the District Court for trial that the defendant asked to amend its answer.

This amendment, offered as it was after the case had once been passed upon by the Supseme Court and returned for a new trial, was improper, and it would have been error to have permitted it to be filed, as it attempted to deny material facts which were admitted in the original answer.

See Spanagel vs. Reay, et al., 47 Cal., 608.
Bliss on Code Pleading, section 430.

Amendments should not be allowed in which matters before admitted by the pleadings to be true are denied.

See Harney vs. Corcoran, 60th Cal., 314.
Page vs. Williams, 54 Cal., 562.
Stewart vs. Lander, 16 Cal., 372.

Notwithstanding the affidavit of the counsel for the defendant it cannot be believed that defendant was ignorant as to whether it was operating its railway or not, the proposed amended answer, it will be observed does not deny that the defendant was the owner of the railway upon which William O. Palmer was killed. It alleges that the train upon which he was riding was being run and operated by the Union Pacific Railway Company. What the relations were between the two companies does not appear. It is also alleged in the proposed amendment that Palmer was in the employ of the Union Pacific Railway Company. How these matters constituted any defense in this action it is impossible to determine. The defendant being a corporation charged with certain duties to the public, was not authorized to shift the responsibility of operating the road or to escape the effect of its negligence in operating the road, by any device not authorized by the power which created it. So far as the proposed amendment is concerned it does not appear nor can it be fairly inferred, that any arrangement existed between it and the Union Pacific Railway Company by which the Union Pacific Railway Company was to be responsible for negligence in the operation of the road or in any other particular. The Union Pacific Railway Company may have been a mere employee of the defendant. We cite to the point that the defendant could not have avoided its responsibility without express authority from the legislature.

Second—Rorer on Railways, section 22, pages 1115 and 1116, Railroad Company vs. Winans, 17th Howard, page 30 and the cases therein cited in the opinion of the court.

Abbott vs. Johnstown, G. & K. Horse Railroad, 80th New York, page 27.

Also Railroad Company vs. Brown, 17 Wall. 445.

We also call attention to the opinion of the Supreme Court of Idaho in this case, which is correctly reported in the 16th Pacific Reporter, page 555.

If the Union Pacific Railway Company was the employee of the Defendant then the action may be maintained against the Defendant by the express term of the Statute of Idaho.

The third assignment of error is fully covered, as we understand it, in the argument just made as to the proposed amendment of the answer and should not have been allowed at any time.

If any error was committed in overruling motion for non-suit at the close of plaintiff's testimony it was waived by the subsequent introduction of testimony on the part of the Defendant.

See Railway Company vs. Cummings, 106, U. S. page 700.
Accident Insurance Company vs. Randall, 120 U. S. page 527.
Bradley vs. Poole, 98 Mass. 169.

We do not deem it necessary to cite further authorities in answer to the fourth assignment of error.

The fifth assignment of error it seems to us is not made seriously; it is in evidence by the witness, Milton Russell, who was called for Defendant, that he did not receive the order to "Look out for the bad place in the track" at the point where the wreck occurred, the attempt of Defendant was to show that the wreck occurred at a different place from that described by the witness Farrell, and about which he left a message at Camas. Counsel then asked witness, Russell, this question: "If you had received the dispatch or message or report which Mr. Farrell made what would have been your action at the particular point where the wreck occurred?" This was objected to and the objection sustained and this is the error assigned. It will be seen at once that the witness could have made no answer which would have been material or relevant in this case. He did not receive the report and it was the duty of the defendant to have furnished him with it. It was made out for his protection and the protection of the lives upon the train on which he was engineer. As it was having no notice of the danger he says he was running at a high rate of speed when he felt his engine pass over the broken track with a heavy lurch and all of the cars except the one next to his engine left the track back to the rear car, which it appears was an extra. Had he known of the danger his conduct would have been reckless and wanton had he rushed into it the way that he did, and whether he would or not certainly makes no difference in this case, because the defendant failed to give the notice, besides the report or message should have been delivered to Flanders, the conductor, who was in control of the train. Russell, according to the testimony, was under his control and would have been compelled, no matter how reckless he might have been himself, to have operated the train as Flandars directed. It seems to us that the testimony should have been confined as it was confined by the court to the trial of the case, as it actually existed, and not to some imagined and hypothetical case which did not exist.

In answer to the sixth assignment of error, witness Fanning was Roadmaster of the Defendant. An attempt was made to show from this witness that the rail which was broken and wrecked the train, may have been broken by the frost and cold. The claim of the plaintiff was that the track was weak and insufficient, and that the rail was broken by reason of cars passing over it. It was shown by the witness that the rail was an iron rail weighing thirty-five pounds per yard in length. Inasmuch as railways usually use steel rails of about twice the weight of this rail, it was important to the correct understanding of this question, as to whether this track was at all sufficient, to know whether the engine and cars were correspondingly light the

plaintiff asked "What was the weight of the engines and cars being run?" This was the question objected to by the plaintiff in error. The objection was overruled and the exception taken. The answer was, "The engine weighed about thirty-five tons." It seems to me that this cross examination was eminently proper, as it presented the question to the jury whether or not the opinion of this Roadmaster that the frost might have broken this rail was correct or whether the more reasonable contention that the extraordinary weights passing over unusually weak rails, which was done under the direction and control of the Defendant, was the cause of the broken rail. It seems to us that it was necessary in order to a fair understanding by the jury of the facts in the case.

As to the seventh assignment of error the same questions are raised in another form that were raised by the proposed amendment of the answer, this having been fully considered above in this argument. In answer to the second assignment of error, we do not conceive that it is necessary to add anything further upon that point at this time. No other objection was made by the defendants in error to questions as to the pass which was offered in evidence and is copied on page 90 of the printed record. This was a pass issued by the Union Pacific Railway Company to the witness, G. W. Barraclough. It was in proof that the deceased and two other men were traveling on this pass at the time he was killed, but that Barraclough was not with them. It was immaterial whether the deceased had any right to travel on this pass or not, or whether the defendant recognized the pass issued by the Union Pacific Railway Company. Had deceased been in the employ of the defendant, and traveling upon the pass at the time, we do not understand that that would release the defendant from liability for the gross negligence such as is proven in this case. The release signed on the back of the pass was not signed by deceased or any other person except Barraclough and the release was to the Union Pacific Railway Company. If this pass had been issued to the deceased and he had signed the release, still it would be against public policy to excuse the defendant from liability for such negligence as was shown in the case at bar. The exhaustive opinion of this court in Railroad Company vs. Lockwood, 17 Wall, page 357, it seems to us is all the authority needed upon this point. See Also Dewyer vs Railway Company 14 Howard 468

This observation and argument made as to the seventh assignment of error will apply with equal force to the eighth assignment of error.

The ninth assignment of error is as to the objection sustained by the court to questions asked by J. M. Bennett. The questions are in substance:—"Who are the general managing officers of the Union Pacific Railway Co?" "Is the Union Pacific Railway Com-

pany running and operating the Utah ~~and~~ Northern—was the Union Pacific Railway Company running and operating the Utah ~~and~~ Northern on the 11th day of December, 1885 ?" Objection were sustaind to each of these questions on account of immateriality and irrelevancy, assuming that the words Utah Northern were intended to designate the Utah and Northern railway; still the matter was irrelevant and presented nothing that would enlighten the jury or court in this case. The defendant by its answer admitted that it was operating and running the railway upon which W. O. Palmer was killed. If this was the line of railway referred to in the question, then the matter was irrelevant; if some other line of railway or any line of railway was referred to then the matter was entirely immaterial and irrelevant.

The tenth assignment of error we cannot believe is made seriously. In rebuttal the Plaintiffs called witness B. T. Lloyd who passed over the entire section of the road on a hand car on the day following this wreck, and he was asked if there was any defect or bad joint upon that road at any other place than that of the wreck which would have caused the lurch of the train and shock that had been testified to by witnesses Taylor and Farrell for Plaintiffs and had been reported by witness Farrell. This squarely contradicted the whole defense of the Defendant, inasmuch as the Defendant's contention was that the place reported by Farrell was different from that where the wreck occurred. This testimony was certainly relevant and in rebuttal of that offered by the Defendant.

In the eleventh assignment of error there is a misprint in line 7, page 114 of the printed record. The word "accident" should be printed "action." With this correction the first instruction given being that numbered "second" is absolutely correct and fully states the law. In instruction numbered "third" the law is also properly stated. In support of these two instructions I cite the following authorities.

Cleveland Railroad Co. vs. Newell, 23 Am. and Eng. Ry. cases, 492 (from Indiana.)

Louisville Ry. Co. vs. Ritter, 28 Am. and Eng. Ry. cases, 28, 167 (from Kentucky.)

Little Rock Ry. Co. vs. Miles, 13 Am. and Eng. Ry. cases, page 10, (from Arkansas.)

Pershing vs. Chicago Ry. Co., 34 Am. and Eng Ry. Cases, 405 (from Iowa.)

Rorer on Railways, Vol II, pages 1066 and 1067, and the cases cited in the notes thereunder.

And there is another reason why any objections to the instructions given by the court can not be considered here. In the certificate of the trial judge, pages 104 and 105 of the printed record,

it is shown that the Defendants in error (Plainttffs below) objected to the allowance of the exceptions to the charge, and it is further shown on page 102 of the printed record that the ground for this objection was that no exception was taken at the time the charge was given. After the court had instructed the jury and the jury had retired to consider the verdict in the case, the Defendant, by its counsel, took an exception to each of the instructions given. This was not in compliance with the Statutes of Idaho Territory, which provided in substance that an exception to a ruling in a matter of law shall be taken at the time the ruling is made.

See section 4426 of the Revised Statutes of Idaho.

This statute had been considered by the Supreme Court of Idaho Territory in the case of Black, ~~vs.~~ the city of Lewiston.

See 13th Pacific Reporter, page 80. The court says:

"After submission of all the testimony and arguments of counsel, in the court below, the learned judge, who there presided charged the jury at considerable length, evidently intending to give them all the law that was necessary for their consideration of the case. To which said instructions and the whole thereof, counsel for defendant excepted. There was no specific exception to any particular portion of the charge, nor did counsel seek to point out or inform the court wherein he claimed the instructions to be wrong, but contented himself with a general exception to the whole instruction. It is not claimed or contended but that many of the propositions of law given by the court were correct While the instructions as a whole very fairly present the law of the case some specific parts of an instruction perhaps might be open to criticism, and these specific portions appellants here assign as error and ask reversal on that ground. We think the exceptions taken entirely too general to be available to the defendant on appeal. The rule seems to be well settled in the federal and most of the state courts, *and we now adopt it as a rule of this court*, that the Supreme Court will not review the charge of the district judge unless his attention has been called by exception specially to those particular portions complained of. The necessity for such a rule is apparent.

In the hurry of jury trials in the district courts, it must often happen that the judge prepares his charge hastily, and without an opportunity for that investigation and deliberation which is desirable and it would be unjust to him and a wrong to suitors, if an error inadvertantly committed, and which the judge would have perceived and corrected had his attention been called to it, should be allowed to work a reversal of the judgment. If the party think the charge wrong in any particular, let him call the judge's attention

to it *at the time, and give an opportunity for correction*; thus saving the necessity for an appeal."

See also R. R. Co. vs. Varnell, 98 U. S., 479.

This was the rule established in Idaho Territory and is explicitly laid down before this case was tried. The same rule has, in substance been declared by this court. In the Life Insurance Co. vs. The Union Trust Co., 112 U. S., 250, this court says: "The attention of the court should be called to the particular point by something more definite than the general exception taken." In Beaver vs. Taylor, 93 U. S., 46, this court says: That a general exception to the charge which did not direct the attention of the court to the particular portion of it to which objection is made, raises no question for review in the appellate court. Clearly the object of an exception is to call the attention of the trial court to matters that are complained of in order that they may be corrected at the time if possible. Now there could be no correction of the charge to the jury when the jury were absent and gone. Plaintiff in error (Defendant below) did not ask to have the jury brought back in order that the charge might be corrected, nor did it attempt to point out anything in it objectionable. The objection to the charge as stated on page 102 of the record, made by the Plaintiff in error was as follows: Defendant by its counsel, took an exception to each of the instructions and to each and every part of each of said instructions so given to the jury at the request of the plaintiffs, and also at said time took an exception as to the refusal of the court to give each of the said instructions requested by the Defendant and refused by the court.

In the case of Nesbett vs. Gill, 38 Wis. 657, the exception was to each and every part of the Judge's charge to the jury, and the court said:

"Under repeated decisions of this court if the charge is correct anything offered as such an exception is entirely insufficient to authorize us on an appeal to review the charge."

See also University vs. Shanks, 40 Wis., 352.

In Hicks vs. Coleman, 25 Cal., 122, the court says: "We take this occasion to remark that exceptions to a charge ought to point out the specific portions excepted to and to be made *at the time of the trial in order that the judge may have an opportunity before the jury retires to correct any error he may have inadvertantly fallen into in drawing up the charge in the hurry and perplexities of the trial.*"

The same rule is declared in New York. The exception in Jones vs. Osgood, 6th N. Y., 233, and in Caldwell vs. Murphy, 11th N. Y., 416. is identical in language with the exception made in the case at bar. The appellate court of New York held that

such exceptions were invalid if any part of the charge given was correct. The same rule has been declared in Kansas.

See Bailey vs. Dodge, 28 Kansas, 72.

The observations made and the authorities cited to the effect that the exception should be taken at the time the ruling is made and before the jury retires, apply with equal force to the twelfth assignment of error. However the instructions asked by the defendant and refused were irrelevant to the issues in the case and were evidently drawn up and prepared for some other and different case than that made by the pleadings in this action. It was alleged in the complaint that the deceased was a passenger on defendants road; that while he was such passenger the car in which he was riding was negligently derailed and Palmer was killed. Defendant denied that Palmer was a passenger; denied that it derailed the car and denied that Palmer was killed.

These were the substantial denials in the answer and the proposed amended answer after making the same denials, stated that Palmer was in the employ of a railway company other than the defendant. Under the proofs there was no question but that Palmer was a passenger upon the train, that the car was derailed and that he was killed. In fact neither of these facts were controverted before the jury. The instructions asked and refused and cited in the twelfth assignment of error, proceeded upon the theory that Palmer, the deceased, was an employee of the defendant a fact which nobody claimed or attempted to prove.

The third instruction was wholly outside the testimony, and if it be conceded that Palmer and the telegraph operator were both employees of the defendant, Palmer being a carpenter employed as a bridge builder, and the operator being station agent charged with sending messages as to the condition of the track, still their relations were not such as to make them fellow servants so that the defendant would be excused from the liability for the negligence of the operator. We have found no case which holds that a telegraph operator or train dispatcher is a fellow servant with a carpenter or a section man, even where both are employed by the same company. Where servants are employed in different departments, although by the same employer, they are not fellow servants within the rule that exempts the master from liability.

See Railway Co. vs. Karey, 3 Ohio State 201.
Railroad Co. vs. Denning, 17 Ohio State 197.
Railroad Co. vs. Collins, 2d Duvall 114.
Chamberlain vs. Railroad Co. 11 Wis. 238.
Burke vs. Railroad Co. 34 Conn. 474.
Hough vs. Railway Co. 100 U. S. 213.

In the case of Railway Co. vs. Ross, this court held that as to all employees upon a train the conductor was the vice principal

and had control of the entire train. It was in proof in this case and not disputed, that the conductor himself was under the direction and control and received his orders from the station agent. If then he was the vice principal as to all under him, certainly the representative of the defendant, the operator, was such vice principal. To recapitulate briefly, the defendant owned and was operating the railroad. The conductor of one of its trains discovered a broken track and reported at the next telegraph station. No attention was paid to the report nor was it communicated to any one. Several hours later the passenger train arrived going in an opposite direction. The station agent, when questioned as to the report, threw the conductor off his guard by telling him that it amounted to nothing, or that he knew nothing about it. The train then proceeded and was wrecked at the place discovered some hours previous. The Plaintiffs' intestate, Palmer, was killed. His age, his health and habits, his earnings and as far as witness might tell, his prospects in life, were submitted to the jury and a verdict in favor of the Plaintiffs was rendered. This is the verdict which the court here is called on to review. We have endeavored carefully to analyze the several assignments of error made to show that they are not well taken. And though this argument is written without the advantage of having seen appellants brief, I still feel confident there is no ground for reversing the judgment and ask that the same be affirmed.

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